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LEGAL ETHICS.*

Mr. Chancellor, Mr. Dean and Members of the Graduating Class:

I am well aware that what I have to say this evening cannot prove of general interest to the audience which is here assembled. But I am confident that the friends who grace this festival with their presence recognize the fact that this occasion belongs to the graduating class, and that any words spoken to-night should be addressed to them. If I can say anything which may be helpful to these gentlemen who now have completed the preparation which the Law School affords and are about to assume the heavy responsibility which active practice of the law imposes, I shall feel that this evening has been well spent though my words prove to be silver and not gold, and my speech be ungarlanded with even "the humble flowers of the mountains."

Gentlemen of the graduating class: I do not assume to speak to you as one clothed with authority, but as one who through experience and observation is entitled to speak as an elder to younger brethren.

You stand to-night on the threshold of the temple of the law and await the opening of the gates which shall admit you as of the priesthood of justice and give you membership in a profession which is one of the most ancient, the most enlightened, the most illustrious and the most honorable of all vocations. It is a profession which in this country has been adorned by many men of signal brilliancy and of imperishable fame. When one recalls John Marshall, Hamilton, Story, Kent, Taney, Pinkney, Wirt, Webster, and

*An address delivered before the graduating class of the Albany Law School, May 31, 1906.

Choate,—“The names that were not born to die,” intellectual monarchs, “a galaxy of the gods”—one may be pardoned for asserting that “the glory of our profession is the glory of our country.” To become a high-priest in the Temple of Justice is worthy of the highest ambition of the noblest men. To establish justice is the purpose of the profession. To serve the state in maintaining the rights of man to life, liberty, property and reputation is its mission. To aid the helpless and relieve the oppressed, to defend the innocent and punish the guilty, to resist even the government itself when it seeks to encroach upon the constitutional rights of the people—this is the lawyer’s work and the lawyer’s duty.

In a state with a backward civilization and an autocrat upon the throne there may be little need for members of our profession. When Peter the Great visited Westminster it is said he learned with wonder that some scores of oddly appparelled persons whom he had curiously asked about were lawyers. “What! all these lawyers?” was his exclamation. “I have but two in all my dominion,” he continued, “and I intend to hang one of them as soon as I get home.” The story reveals the difference in the civilization of the two countries. In the one there was a government of laws and not of men, and the lawyers were numerous and influential. In the other the government was the Czar and his will was law and there was no need of lawyers. And when Jack Cade’s insurrection was thought to have succeeded, Dick the Butcher said to Jack: “The first thing we do, let’s kill all the lawyers.” Thereupon Cade replied: “Nay, that I mean to do.” Under a government conducted by men of his ilk lawyers might easily be dispensed with. But under a government of laws and not of men lawyers are indispensable.

In one of the learned professions those who cherish intellectual integrity often find themselves, according to their own admissions, more or less embarrassed. Original thinking is, they claim, discouraged in their professional schools, the methods of which are too often narrowing and deadening to intellectual growth. Judged by their own statements we find, in a profession in which intellectual honesty should be exalted, that it is discouraged. In the legal profession intellectual honesty is never anathematized. Indeed no man can reach eminence in our profession unless he possesses intellectual honesty. Mr. Edward J. Phelps once said that the leading characteristic of every great lawyer or great judge that had ever lived was intellectual honesty. It is sometimes necessary in the law as in the ministry to excommunicate one who has shown himself unworthy of confidence. But when a lawyer is disbarred it is always because of

unethical conduct, and never because the profession wishes to fetter the freedom of his mind. In schools of law, however it may be in schools of theology, original thinking is encouraged. The student in the law schools is not compelled to accept dogmatic teaching on authority which is not to be disputed. He has the right to reason why. He is to test the judgment of courts by reading, comparison and discussion, that he may satisfy his own mind whether the conclusions reached are right or wrong. If tradition is on one side and truth on the other, it is always his privilege to show the mistake and reveal the truth. There is little embarrassment with us in adjusting old opinions to new knowledge, and we are not divided into orthodox and heterodox according as we accept the new learning or the old. There is no necessity with us that heresy-debaters should

"Prove their doctrine orthodox
By Apostolic blows and knocks."

But whatever may be the embarrassments of this sort to which the theologian is subjected, the lawyer has difficulties enough of his own and of which the theologian is wholly ignorant.

"Much lighter task the minister's
Than is the lawyer's, one infers;
The simple fact is,
As adage and experience teach,
It is much easier to preach
Than 'tis to practice."

The practice of the law has sometimes been represented as a tricky sort of business, and the advocate as a "shady" sort of individual. Charles Macklin characterized the law as "a sort of hocus-pocus science that smiles in your face while it picks yer pocket, and the glorious uncertainty of it is of mair use to the professors than the justice of it." And Dr. Johnson, when asked at a dinner party as to the identity of a guest who had just left the room, said: "Gentlemen, I do not like to speak ill of a man behind his back, but I believe he is a lawyer." And there is the story of one looking about in a country churchyard and coming upon a stone with the inscription: "A good lawyer and an honest man." "It is very strange," he said, "that where land is so cheap they should bury two men in one grave."

But all such characterizations of the profession are after all not meant to be taken seriously. The practical judgment of those who are competent to form an intelligent opinion is that the bar is not surpassed in honesty, candor and honor by any class of men of like numbers. No person can become a lawyer unless he can satisfy the

court not only that he has sufficient knowledge of the law to entitle him to enter upon the duties of an attorney, but that he has what is equally, if not more, important—a good moral character. As it is essential to his admission to the bar in the first place that the applicant be in truth and in fact a good, moral man, it is certainly equally essential that he maintains that character after he has been admitted. An attorney will be disbarred whenever it is demonstrated to the court that he is not an honest man, for the lawyer in becoming dishonest violates the essential condition upon which he was admitted to the bar, and forfeits all claim to recognition either by his professional brethren or by the courts.

The philosophers tell us that jurisprudence has its base in ethics. A profession which is devoted to jurisprudence, and which is, therefore, continually concerned with questions of right and wrong, must itself inevitably be governed by high ethical standards. Indeed no one of the professions affords a nobler intellectual pursuit, and not one establishes for the conduct of its members a higher moral standard. A written code of legal ethics has never been formulated by the American Bar Association. And in the admirable address delivered not long ago before the students of this school by Judge Landon of the New York Court of Appeals that distinguished jurist stated that he did not know that any bar association had attempted to establish in concrete detail a comprehensive professional code. A code of medical ethics was adopted a number of years ago by the medical profession in the United States, acting through its national organization. I shall not venture to explain why the lawyers of the United States have failed to act in a matter of this importance. It is not to the credit of the legal profession that it has been in this respect so much behind the medical profession. Action has, however, recently been taken by a few of the states. A code of legal ethics was adopted in 1898 by the Bar Association of Colorado. And in 1903 the Kentucky State Bar Association did likewise. It is possible that similar action may have been taken in other states. I wish it might be done in all the states and by the American Bar Association as well. I am sure that such action would prove helpful to the profession throughout the country. I cannot yield assent to the proposition that it is better that rules of conduct should not be reduced to exact detail lest the spirit be cramped in the letter. The men of light and leading who do not stand in need of any written code will not permit themselves to be cramped by the letter of it, and those whose conscience is less sensitive and whose ideas of professional honor are not so clear and strong as they might be are

likely to find themselves considerably helped by it. Law has in every community an educative force. And a code of legal ethics approved by the Bar Association of the country could not but exert a wholesome influence upon the American bar.

The French bar is controlled by a written code of ethics. It regulates by the highest standard every phase of the advocate's professional life. "Nothing," it has been said, "is too small for its care, nothing too great for its control." It inculcates diligence, sobriety, truth, honesty, courtesy, dignity and independence. It applies to every relation of the advocate, to his general duties as well as to his duty to his clients, to the judges and to his brother advocates. It affirms that one cannot be a perfect advocate, if he be not a good and honest man. In each judicial department of that country exists a council of advocates which tries all infractions of the code, and censures, suspends, or dismisses those who are found guilty of a transgression of the ethics of the profession. The bar of that country is not only a thoroughly educated body of men, but one trained "in the highest school of professional ethics." It is said to be organized to the encouragement and advancement of everything advantageous to the state, and to the resistance of everything hurtful to the state.

As the law of the land is not to be found in the written statutes alone, but may be derived from unwritten sources, so we are not to assume, because a written code of legal ethics has not been formally adopted in a particular state, that therefore none exists. Professional ethics can never be dependent on a written code. A man of sound moral sense does not abstain from murder or theft because legislatures have enacted laws prohibiting, under penalty, such a violation of man's rights to life and property. And a lawyer is unworthy of membership in the profession who would regulate his conduct solely according to what the law permits rather than by what morality and honor require. But if we seek for the rules which should govern professional conduct, we find them indicated in the oaths administered to those who are admitted to practice, and in the judicial decisions handed down in cases in which lawyers have been rebuked or disbarred, as well as in the precepts which have been handed down from one generation of lawyers to another as showing the consensus of opinion which has prevailed among the honorable members of the profession in this and other lands.

I have noted in some of the addresses which have been delivered by those who have spoken here on similar occasions that reference has been made to the oaths administered to members of the bar in certain of the states of this country. I have found in none of the

oaths to which they have made reference, not even in that administered in the state of Washington or in the New England States, a more admirable setting forth of the ethical duties of the lawyer than is to be found in the oath which is taken by the lawyers of Germany. In that country the lawyer swears obedience to the constitution and the laws, and to faithfully and industriously aid everybody, the poor man quite as willingly as the rich man,—without fear of the courts—to his right, by advice, speech and action; that he will not overcharge parties with fees; not obstruct the amicable settlement of law suits, but further it is as much as possible; not retard or hinder justice in any way whatsoever; never give countenance to dishonest designs of parties, particularly not suggest to any party or any accused person groundless subterfuges and statements contrary to the truth, or recantation; and if he should find the cause of a party, in his persuasion, to be without foundation, or not based upon the law, and he could not amicably dissuade such party, as is his duty to do from its intent, that he will not represent it in court in such cause any longer; that he will never, in any case taken in hand by him, speak and act more than he is instructed to do; that he will keep secrets intrusted to him inviolate; take care of and return in good time public papers and records laid before him or communicated to him; keep safely funds which may be intrusted to him, and give a conscientious account of them; and finally show to the public authorities and courts, before which he appears as counsel, due respect, and abstain from all invective against the same; also that he will not be prevented from the fulfillment of these duties either by favor, gifts, friendship or enmity, or any other impure motive, and that he will altogether so behave as is becoming and befitting a conscientious and duteous attorney and counsellor at law. In any country which administers such an oath a tricky, quibbling and mendacious bar is impossible.

The ethical basis of conduct for the lawyer is the same as for any other member of society. That which one cannot honorably do as a man he cannot honorably do as a lawyer. The profession imposes no obligations upon its members which degrade true manhood and debase those higher ideals which men of nobility and chivalry always cherish. In the pursuit of all ends, whether within or without the profession, we are alike restrained by God's law as well as by man's law to good means and to good ends. No one, be he lawyer or layman, has a right to seek wrong ends by good means. And no one has a right to seek good ends by wrong means. We cannot do evil that good may come of it. The due administration of justice

does not involve a subversion of ordinary ethical rules, and the general code of morals makes no exception in favor of the legal profession, but is applicable alike to all classes and conditions of men.

Lord Macaulay in his great essay on Lord Bacon gives the impression that in England the lawyer's code of ethics permitted a man "with a wig on his head and a band round his neck," to do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire. Macaulay intimates that lawyers of his day, knowing a statement to be true, thought themselves nevertheless justified in doing all that could be done "by sophistry, by rhetoric, by solemn asseveration, by indignant exclamation, by play of features, by terrifying one honest witness, by perplexing another, to cause a jury to think that statement false." If the code of legal ethics which existed in England when Macaulay wrote countenanced the conduct to which he refers,—and I am frank to say I do not believe it did—it is certainly true that no honorable member of the profession in either country to-day recognizes any such code. There is no code of ethics either in England or in America which is based upon the theory that there are two kinds of morality; that one kind applies to the legal profession and the other to the rest of mankind. If one undertakes to tell you that there is one morality for the bar and another for the rest of the world, be assured he is a teacher of false doctrine. To follow after him is to go to your own undoing.

John Milton's father intended him for the ministry—a high and sacred calling. But the choice of the father was not the choice of the son. Milton refused to enter the ministry because he was unwilling to enter a profession which he thought required him to advocate doctrines which he did not believe to be true. Can a man dominated by as strict a sense of honor as characterized Milton become a lawyer? That question has long been a mooted one. Many men have in all the years come to the bar with serious misgivings concerning it. That devout Christian men of exalted character have entered the profession and attained to eminence in it cannot be denied. How could they do it? inquires the casuist. How can an honorable man enter a profession in which he will have possibly to maintain the side that is wrong? As only one side can be right, the lawyer, he tells us, must be half the time endeavoring to establish that which is wrong, seeking to accomplish injustice.

The fallacy of his contention lies in his failure to appreciate that in its inception at least there are two sides to every case. The purpose of the litigation is to ascertain what the exact facts are and then

apply the law to the facts. "It is only on the anvil of discussion that the spark of truth can be struck out." It is seldom the case that a lawyer goes into a litigation believing that his client is in the wrong. Lawyers do not go into court to lose cases, but to win them. Their reputation is enhanced by the victories they win. It is not improved by the defeats they suffer. A venerable jurist, of the finest sense of honor and the purest integrity, is quoted as saying after fifty years of the most laborious professional life, that he had never but once thought his client in the wrong.

But the chief difficulty which the casuist encounters is to reconcile with his standards of honor the defense of one believed to be guilty of crime. So far as the majority of lawyers is concerned the question is little more than an academic speculation. The practice of the criminal law engages the attention of very few members of the bar. In the popular mind, however, the profession is often condemned because of the opinion which so many people entertain that the lawyer, in defending a known criminal, is endeavoring to cheat the law and acquit the prisoner and thus wrong society and the state.

Wendell Phillips in his speech on Rufus Choate pictured a Parthenon of jurists in which the visitor was to be shown from statue to statue. Greece was to exhibit her Solon and his code of laws, and Rome her Papinian, and France her D'Aguesseau, and England her Erskine; and then New England was to point to Choate and say "This is Choate, who made it safe to murder, and of whose health thieves inquired before they began to steal." Now if Choate in the practice of his profession made it safe to murder and to steal, we shall be compelled to admit that his occupation was a very poor one. To call such business "a little shady" would be to dignify it too highly. It would clearly deserve condemnation as something unworthy and quite indefensible. And yet no man in Massachusetts stood higher than Choate. No man questioned his personal integrity. No man cast suspicion upon his uprightness of life. He was not merely of brilliant intellect, but he was likewise of high ideals. The old commonwealth of Massachusetts holds him in reverence to this day as one of her greatest and noblest sons. In the court house at Boston is a statue erected to perpetuate his fame.

A theory which condemns his calling while it exalts the man cannot be sound. The fallacy of it is easily shown. In every civilized state the principle is recognized that the government ought to punish only those who have violated its laws and whose guilt has been established in accordance with the forms which have been fixed by law. That this principle should be adhered to is essential to moral-

ity and to the maintenance of social order. The lawyer who insists that a man accused of crime shall not be punished until his violation of the law he is charged with breaking has been established in the courts and his guilt proven by evidence such as the law requires in that class of cases, is discharging a duty to the state which is as important to society as any he can render. The state has no right to take life or deprive a citizen of his liberty unless he has broken a law and that fact has been established by legal evidence in the manner prescribed by law. A departure from that proposition means the overthrow of social order. In its place would come lynch law and anarchy.

It is because of this fundamental truth that the lawyer is justified in appearing in court in defence of a criminal. He is there not to subvert the laws of his country but to conserve them, not to pull down the pillars of the state but to uphold them, not to find some way by which a wicked man is to be let loose to prey upon society to its undoing. He is there to see that justice is done and that no man shall be condemned by the law until his guilt has been established by the law and in accordance with the forms of law. In rendering this service to the prisoner the lawyer discharges a duty to the state as well as to the defendant, and he is not called on to do anything an honorable man should not do. In discharging this duty he must, of course, be governed by the same high principles by which his conduct is governed in other cases. He cannot misrepresent either the law or the facts. He cannot play the part of a trickster and pervert evidence or quibble with words.

A question which has troubled the conscience of many has been whether a lawyer can properly take advantage of the statute of frauds or the statute of limitations to defeat a claim otherwise valid and which is asserted against his client. It is necessary to remember that these rules have been prescribed because they were found essential to the due administration of justice. They are regarded by the courts and by the profession as salutary. For this reason, in the judgment of the profession, it is not immoral for a lawyer to assist in enforcing them against a negligent party who has ignored them.

An honorable lawyer who respects himself and his profession will decline, with contempt, all cases in which a party seeks to sustain some unconscionable advantage which he may have obtained through fraud, accident or mistake. "Yes," Mr. Herndon who was his partner reports Mr. Lincoln as advising a client, "we can doubtless gain your case for you; we can set a whole neighborhood at

loggerheads; we can distress a widowed mother and her six fatherless children, and thereby get for you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs as much to the woman and her children as it does to you. You must remember, however, that some things legally right are not morally right. We shall not take your case, but we will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man. We would advise you to try your hand at making six hundred dollars in some other way."

Among the cases which no lawyer should touch are the fraudulent divorces which parties obtain on false allegations of residence, and on testimony which makes a false presentation of fact to the court. Any lawyer who meddles with such cases of necessity forfeits his reputation.

The duty of the lawyer to his client is to advise and assist him in every honorable way to maintain and defend those rights and privileges secured to him by the constitution and the laws of the country. The relation existing between the lawyer and his client imposes upon the former as well as upon the latter the duty of observing the utmost candor. If authorities are conflicting upon the question of law which the proposed litigation involves, the client should be fully informed of the fact and not urged to engage in a doubtful contest without full knowledge of its uncertainty. And if a case is of such a nature that a slight variation of the proof might change the entire legal aspect, that fact must be made known to the client also. Litigation should never be commenced until the client fully understands the situation.

It is the duty of a lawyer to discourage his client from litigation and endeavor, if possible, to bring about a settlement of the controversy by agreement between the parties when this can be done without an improper sacrifice of his rights. "As a peacemaker," said Lincoln, "the lawyer has a superior opportunity of being a good man." Lawyers who seek to avoid litigation and compromise difficulties are of that number to whom the beatitude, "Blessed are the peacemakers," most fittingly applies.

In marked contrast is the lawyer who goes about looking for litigation. That kind of a lawyer is a mortification to his professional brethren. To stir up strife is contrary to law and forbidden in morals. No man who has self-respect, or who regards the ethics of the profession will chase an ambulance or search the records to discover defects in titles in order that he may secure a client and commence a suit.

A lawyer consulted upon a matter concerning which he is uncertain as to what the law really is owes it to his client and to his own reputation to reserve his opinion until he can take time for investigation and reflection. Some lawyers and especially those who have come recently to the bar, fear the effect upon a client of not appearing ready at once to express a definite opinion on any question. The practice in the end brings them into disrepute.

The lawyer cannot assume that he has no moral responsibility for the unconscionable acts of a client. The lawyer is not without fault who intentionally so draws a contract or drafts an instrument that a client may take unfair advantage of another by virtue of some clause, the true meaning of which he has concealed in legal verbiage. He who assists a dishonest client by counselling him how to organize and so exploit a corporation as to defraud the public and obtain good money for worthless stock is as much a scoundrel as is his unscrupulous client.

One cannot advise a client how he can so dispose of his property as to defraud his creditors and co-operate with him in accomplishing such a result and not be as guilty as his client. That there are such lawyers is unfortunately true. But this class of men is likely to discover that while there were no lawyers in Dante's *Inferno* some will be found in the real *Inferno*.

The duty which the lawyer owes his client imposes no obligation to make that client's malevolence toward the opposing litigant his own. To abuse the opposite party and indulge in offensive personalities for no better purpose than to gratify the whims and malicious feelings of a client is most unworthy of a high-minded attorney. D'Aguesseau, who is regarded as the ornament of the century in which he lived and who attained to the high office of Chancellor of France, said to the bar of his country: "Let the zeal which you bring to the defence of your clients be incapable of making you the ministers of their passion, and the organs of their secret malignity."

In speaking of the duty of the lawyer to his client I desire to warn you against the mistake of governing your conduct according to the standard which it is too commonly supposed that Lord Brougham laid down in his remarkable speech in defence of Queen Caroline. He there said: "An advocate, by the sacred duty which he owes to his client, knows, in the discharge of that office, but **one person** in the world—that client and none other. To save that client by all expedient means, to protect that client at all hazards and costs to all others,—and among others, to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm,

the suffering, the torment, the destruction which he may bring upon the other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on, reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client's protection." Giving to this utterance the meaning which is ordinarily placed upon it I have only to say that it has been properly denounced as "a degenerate view" of professional duty and honor. The Court of Appeals has fittingly said of it that, "such a proposition shocks the moral sense." (32 N. Y. 133.)

But Lord Brougham, although he spoke in the heat of conflict, never uttered the words to which I have referred with any such meaning as too often has been wrongly given to them. Those words are said to have been understood at the time and to have been accepted by the better opinion since as a veiled threat to the crown officers that Brougham, if driven to the wall by the exposure of the imprudencies of his client,—not calling them by a harsher name—would retaliate by raising the question of the King's marriage to Mrs. Fitzherbert, regardless of the serious consequences which might result regarding the title to the throne and the succession.

The ethics of the profession require that in the conduct of litigation the utmost courtesy should be extended to the counsel on the opposing side. Litigation is not between attorneys but between clients, and attorneys are not to try each other but the merits of the cause. Whatever ill feeling may exist between the litigants their attorneys are not to partake of it in their demeanor toward each other. As it is improper to abuse and vilify the opposite party to the suit, or his witnesses, merely to gratify the malevolent feeling of a client, so it is contrary to all propriety to indulge in offensive comments upon his counsel, ridiculing his personal peculiarities and idiosyncracies. Gentlemen never lay aside their dignity and descend to blackguardism. If such conduct calls forth the applause of the vulgar, it provokes the contempt of all whose opinion is of value.

If the opposite counsel fail to show that courtesy which is due and it becomes necessary to rebuke him the circumstances must determine how it shall be done. A story is told that on one occasion a lawyer challenged a juror because of his personal acquaintance with Mr. Lincoln, who was on the opposite side. When it came time for Mr. Lincoln to examine he gravely followed his adversary's lead and began to ask the talesmen whether they were acquainted with his opponent. After two or three had been thus questioned the judge interfered. "Now, Mr. Lincoln," he observed severely,

"you are wasting time. The mere fact that a juror knows your opponent does not disqualify him." "No, your Honor," responded Lincoln, dryly. "But I am afraid some of the gentlemen may *not* know him, which would place me at a decided disadvantage."

In the celebrated *Speculum Juris* of Guillaume Durand, who died in 1296, I find directions regarding an advocate's behavior to the advocates on the other side. "You are not to indulge in personalities towards him," he says, "but to treat him decorously; unless indeed he treat you rudely: and when replying to his argument you should commend him slightly, but not too much, and commend him by equivocal words. But you must not treat your adversary with contumely, or call him, in plain words, a ruffian or a prevaricator; or insinuate as much, as by saying, 'I am not a thief,' thereby intimating that he is. But if the other accuse you of falsehood, you may safely say 'You are a liar,' but you should protest that you do not say so with intent to injure him, but only to defend your own cause. But if your adversary do not revile you, you should use temperate words, such as, 'with your permission,' or, 'saving your reverence,' or some such words. If he have listened to you patiently, you are to reciprocate, but if he have made a noise or a tittering, you may do the like. You are to note well and retain in your memory what he says; for if he has spoken long, it is hard if you cannot find fault with something. It is better to be silent than to speak foolishly; according to the proverb *Mas val callar que fol parlar*. . . . If your adversary seem to get the better in argument, or if your cause be weak, go off warily to another point; and if he be of a bilious temperament, you should indirectly and very smoothly say something to make him angry; for then he will not be able to shape well his speech." (Year Book 32-33 Edward I, p. XXV.)

The duty of the lawyer to the court pledges him by his oath of office to diligent service and good faith to the court as well as to his client. He must strictly observe courtesy and truthfulness. By stating as facts what he knows are not facts, to deceive the court, by misquoting evidence, by making unfair citations of authorities, the lawyer violates his oath and the ethics of his profession and seeks by dishonest methods to support his cause. To mislead the court has been called a sort of "domestic treason." He may be sure that his sin will find him out. Deceit in one case may sometimes win a case, but the man who practiced it has sacrificed his future and destroyed his influence with the court. The lawyer, as an officer of the court, must give fair and candid counsel to the judge if he expects to have respect accorded to his utterances.

In Durand's *Speculum Juris* to which I before referred, advice is given as to the behavior of advocates towards the judges. As he wrote six hundred years ago I call attention to his words: "When before the judge, you are to take off your cap and make an obeisance, graduated according to the rank of the judge. Do not be loquacious. Address the judge in a manner that may be pleasing to him, and if he be angry, do not rejoin. If a point is being mooted in another's cause, and you know a canon or law which decides it, cite it boldly, for thus you will have credit with the judge in a case of your own. But, if you are acquainted with the judge, be silent, for perhaps he will call you to consult with him, according to the Lombard custom. Do not laugh causelessly before the judge. When the judge speaks, listen respectfully and then laud his wisdom and eloquence. When your time for speaking comes, rise gracefully, but not arrogantly; put on an affable and pleasant look; do not move your head or feet awkwardly. A proper management of tongue, feet, hands and eyes is important. After a slight pause, begin by requesting a favorable hearing from the judge and the audience, and by commending the judge for various (special) qualities; but be careful about attributing all these to one person; and be careful not to say anything to offend the judge. Some say that an advocate should frequently go and whisper to the judge so that he on the other side may fancy that they are talking about him and thus lose his temper."

But if courtesy is due from the lawyer to the court it is also due from the court to the lawyer. The obligation is reciprocal. Three hundred years after the *Speculum Juris* was written Bacon wrote his Essay on Judicature, of which it has been said that those on the bench would do well to read it over every year. In writing of the duty of the judge towards the attorney Bacon said: "There is due from the judge some commendation and gracing, when causes are well-handled and fair pleaded, especially towards the side which obtaineth not; for that upholds in the client the reputation of his counsel, and beats down in him the conceit of his cause."

Occasions sometimes arise, though happily they are few in number, when an advocate must decide between the duty which he owes the client and the duty he owes the court. The necessity arose upon the trial of the Dean of St. Asaph. The jury was trying to return a verdict which would have released the defendant from the crime with which he was charged. Mr. Justice Buller was endeavoring to record the verdict as the jury did not wish. Mr. Erskine persisted that the verdict should be recorded as the jury desired. "Sit

down, Sir!" said the court. "Remember your duty or I shall be obliged to proceed in another manner." "Your Lordship," Erskine replied, "may proceed in what manner you think fit; I know my duty as well as your Lordship knows yours. I shall not alter my conduct." This man, regarded as the greatest advocate of all time, always had proper respect for the court, but never permitted a judge to unduly interfere in the discharge of what he regarded as his duty to his client. The admonition of the mighty Mansfield himself could not deter him while he was yet a briefless barrister. To Mansfield's statement that Lord Sandwich was not before the court Erskine answered: "I know he is not before the court, and for that very reason I will bring him before the court." Lieber states the principle which should govern counsel in cases of this character. "A true advocate," he says, "will never forget that in defending a citizen he is as much the representative of the law of the land, which wills protection to everyone, as is the judge, and, with all respect for the bench, he will, if the case calls for it, stand up for his client's rights." The true lawyer who respects himself and possesses both an intellectual and a moral conscience will distinguish between the courtesy which is due the bench and that obsequious and servile subserviency to the court which no judge has any right to demand, and which, if demanded, ought never to be accorded. The rights of a client are never to be sacrificed in order that the attorney may maintain his "standing" with the court.

As the lawyer is an officer of the court he is by that fact an officer of the state, the judiciary being one of three co-ordinate departments of the government. Justinian's direction to Tribonian was, "commence then to instruct scholars in the science of the laws and conduct them along the way we have opened in order to make them good officers of justice *and of the state.*" Originally in England the right to appoint attorneys was, like the right to appoint the judges, a royal privilege. Prior to the statute of Westminster II, c. 10, (1285), all attorneys were made by letters patent issued under the broad seal, and which commanded the justices to admit the persons named to be attorneys of the court. In New Jersey to this day attorneys-at-law are invested with their privileges by letters patent issued by the governor of the state on the recommendation of the Supreme Court certifying that the persons named have been found possessed of the proper qualifications. (70 N. J. L. 537.) The lawyer, because he is in a sense an officer of the state, owes to the government a greater responsibility than the ordinary citizen.

Among the duties which the lawyer owes the state is that of saving the judiciary from becoming the spoils of party. The selection of the judges should never be left to that odious creature—a party boss, whose dominant influence in American politics constitutes so serious a menace to our institutions, and who is so ill fitted to pass upon the fitness of men for the judicial office. The interests of the Commonwealth and of the profession require that only men of learning, probity and of the judicial temperament should be permitted to sit in the high seats of justice. And whether a man is possessed of these qualifications is known best to his professional brethren. It would be well, therefore, if judicial nominations could be determined or influenced by the profession rather than by the politicians. The bar associations in New York and Chicago on several occasions have set an example to the bar of the country which is worthy of all emulation in taking active steps to secure a non-partisan judiciary.

Another duty which the lawyer owes the state is to maintain the confidence of the people in the courts and to defend the judiciary against unjust criticism, which is not always saved from being mischievous by the fact that it is wholly false. A reckless criticism of the courts indulged in by ignorant and mistaken agitators may do much harm, and in our country has already to some extent and among certain classes of people created a most unfortunate distrust of the impartiality of our judicial tribunals. American judges, with here and there a rare exception, are men of high honor who seek to hold the scales of justice even. No one knows this better than the lawyers who practice in their courts, and no one is better qualified to say so when the necessity arises. There are persons who profess to think that

"The net of law is spread so wide,
No sinner from its sweep may hide.
Its meshes are so fine and strong,
They take in every child of wrong.
O wondrous web of mystery!
Big fish alone can creep through thee."

The prejudice is not peculiar to our time. Shakespeare gave expression to the same feeling in his day when he wrote:

"In the corrupted currents of this world
Offence's gilded hands may shove by justice
And oft 'tis seen the wicked prize itself
Buys out the laws."

The same thought was again expressed when he said:

"Plate sin with gold
And the strong lance of justice hurtless breaks."

The profession knows that this prejudice is ill founded. The country has lately seen United States senators convicted of crime, and in a United States Court in Georgia two men sentenced to the penitentiary who had defrauded the government of a million and a half of money. That laws have been systematically violated for years by great corporations and that those responsible have gone unpunished cannot be denied. But courts are not responsible for the fact that in the eighteen years existence of the Interstate Commerce law only one conviction for a violation of the law was obtained, and that until last December there had not been a single conviction under the Elkins act of 1903. There can be no convictions unless officials whose duty it is to institute the necessary proceedings bring the violators of law to the bar of justice. Let the blame always rest where it belongs, but never where it does not belong.

Another duty which is due from the lawyer to the state is an honorable discharge of his obligations as a law-maker in the legislative assemblies of state and nation. Lawyers predominate in all halls of legislation. They are sent there because their knowledge of existing laws, and of the defects in those laws and how they can best be remedied, qualify them above other men for the work of the law-giver. They are expected to see that only good and effective laws are placed in the statute books. They are in the legislature as counsel for the state, and their duty is to legislate in the interests of the state. The ethical obligation is to the Commonwealth.

But the lawyers who get themselves elected to legislative bodies not to serve the state but to further private interests, and who really represent corporations seeking special privileges are as false to their trust as lawyers who in the courts betray their clients. They are in fact more deserving of censure for they betray not one client but a whole state. It is a shameful fact that lawyers who resist with hot indignation any suggestion to betray the cause of a client pending before the courts are yet willing to betray the cause of the people in the halls of legislation. They sacrifice the welfare of the state to private interests and seem unconscious of the infamy. The contentment of a people is dependent on a system of wise, just and equal laws. When a conviction becomes dominant in the popular mind that legislative bodies are rotten at the core, that legislation and official places are bought and sold as in the days of the Roman Empire, that corporations write the laws by which they are supposed to be regulated, and that those laws are so framed that the public may be plundered "according to the statutes in such case made and provided," and that it has been possible for corporations to intentionally

ruin some and enrich others,—these things tend to provoke a socialistic and anarchistic spirit and to cause men to lose confidence in the honesty and beneficence of the government. The country is to-day passing through a period of national humiliation. Recent investigations have brought to public notice shameless deeds which dishonor the American character and cause honest men to hang their heads in sorrow and mortification. Each new day brings some new revelation, and borne on the wings of every wind come startling disclosures, affecting the leading corporations of the country. Thirty years ago in the Constitutional Convention of Pennsylvania, Jeremiah S. Black, a great and brilliant lawyer, complained of the corruption that existed even then in the legislature of his own state. He spoke of the fact that the Pennsylvania Railroad Company had been clothed with imperial power. "That corporation," he said, "has grown so mighty that its little finger is thicker than the loins of the Commonwealth which created it. I do not say that it bestrides your narrow state like a Colossus, for the ancient Colossus of Rhodes was but the image of a pigmy in comparison to this Colossus of railroads." And then he went on to declare that "If the honest citizens of the state who have been so basely betrayed by these miscreants (the members of the legislature) would obey the impulses of their natural indignation, and had infinite power to work their will upon them, they would set them upon the remotest battlements of God's creation—far out upon the borders of chaos and old night—and then lash them naked around the circumference of the universe." Corruption, he said, was getting worse and worse not only in Pennsylvania but throughout the country, and he predicted that our institutions must utterly perish unless we stopped the mischief and cut out the cancer. I cannot but think that the conditions which he described, and which have disgraced other states than his, would never have been possible if the lawyers in legislative bodies served their client, the Commonwealth, with the same fidelity with which they serve their private clients.

It sometimes becomes the duty of the bar to resist the government itself, and on such occasions the advocate will never permit any personal considerations to interfere with the discharge of that duty. No lawyer will forget Erskine's declaration that he would at all hazards assist the dignity, independence and integrity of the English bar, adding that: "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end." Chateau-

briand in his "Melanges" has described, in words which the world has not forgotten, the defense of Louis Sixteenth by M. de Malesherbes. When the King was dragged before the convention for judicial murder Malesherbes came forth from his retirement and volunteered his services for his defense. "Plutarch," says Chateaubriand, "has transmitted to us nothing more heroic. When the King was led to the convention M. de Malesherbes addressed him only as 'Sire' and 'Your Majesty.' Treilhard heard him, and cried out furiously, 'What renders you so bold to use words which the convention has prescribed?' 'My contempt for you and for life,' replied M. de Malesherbes. This cost Malesherbes his head, but in defending his King he had discharged his duty fearlessly. In our own day we have seen a brilliant French advocate, without hope of remuneration and knowing that his life was in danger and that the public sentiment of his country was against him, walk into the arena of justice and vindicate the rights of Dreyfus against the government and the military tribunals of France.

Professional ethics deafen the ear of the lawyer to the clamor of the mob as well as to the threats of the government. The louder the popular clamor the more imperative becomes the duty of the lawyer to face and defy it. Men, when they are condemned, must be condemned by the law and not be convicted and punished by the public outcry. John Adams was right when he said that one of the best services he ever rendered his country was when in 1770 he defended in the courts of Boston Captain Preston and his six soldiers of the British army who were charged with murder in firing upon the populace. Mr. Adams vindicated the majesty of the law although he called down on his own head at the time a great clamor of rebuke and wrath.

As Froissart said of his chronicles of chivalry, let mention be made of these things "to encourage all valorous hearts and to show them honorable example."

Mr. Gladstone, in 1894, at a dinner given in honor of a distinguished member of the French bar used this language: "I have always felt that the bar is inseparable from our national life, from the security of our national institutions, but never, so long as I looked at England alone, did I understand the full extent of its value. Some years ago, it was my lot to be a witness of cruel oppression in a country in the South of Europe. There the executive power did not merely break the law, but deliberately supplanted it and set it aside and established in its stead a system of pure arbitrary will. To my astonishment, I found that the audacity of tyranny

which had put down chambers and municipalities and had extinguished the press, had not been able to do one thing, to *silence the bar*. I found in the courts of justice, under the bayonets of soldiers—for they bristled with bayonets—in the teeth of power, in contempt of corruption and in defiance of violence and arbitrary rule, lawyers rising in their places and defending the cause of the accused, with a freedom and fearlessness which could not be surpassed in free England."

That justice travels with a leaden hoof is the fault, in a great degree, of our profession. The law's delay is now, as in the days of the Prince of Denmark, among the greatest "ills that flesh is heir to." The lawyer's accountability in this matter is in part due to the fact that in all legislative bodies the lawyers shape legislation and can establish the modes of judicial procedure. It is also due in part to the dilatory tactics of lawyers who in actual litigation seek by every possible means to prevent a decision being reached on the merits, and when it has been reached endeavor to prevent its being carried into effect. A lawyer is guilty of discreditable conduct who seeks with persistent ingenuity and by technical attacks on immaterial points in either a civil or a criminal proceeding to defeat a judgment sustained alike by the law and the evidence. In criminal cases, when the evidence has established beyond a doubt the guilt of the accused and when juries have been properly instructed and no errors have been committed, cases are appealed with no reason for doing so except to delay execution of judgment. The Court of Appeals of New York has rebuked the conduct of attorneys of this sort who seek to use the forms of law to subvert the law. "Attorneys and counsellors admitted to practice in the courts of this state are under a duty," said the court, "to aid in the administration of justice, and they cannot consistently with this duty engage in vexatious proceedings merely for the purpose of undermining the final judgments of the courts and defeating the behests of the law. It ought to be a subject of inquiry, therefore, whether they can thus become the allies of the criminal classes and the foes of organized society without exposing themselves to the disciplinary powers of the Supreme Court." (128 N. Y. 589.) Attorneys who indulge in such conduct help to bring the administration of justice into disrepute, and create a lawless spirit among the people who grow tired of the law's delays and resort to lynchings, which disgrace the country and shock the world.

In so far as delays are due to old and defective methods of procedure it is the duty of the profession to lead in their reform. That

"justice delayed is justice denied" is but too true. The responsibility is ours, and so long as such a condition is permitted to exist the public suffers and the profession is damaged. The English courts, once the most dilatory in the world, have become in recent years the most expeditious. So shameful were the delays of the English Court of Chancery, so graphically described by Dickens in "Bleak House," that someone has said that over its portals should have been written Dante's inscription on the gates of hell, "He who enters here leaves Hope behind." But even in the courts of the common law long delays cast a shadow over the fortunes of litigants. The lawyers of England reformed these abuses, and more effective methods of procedure were adopted. In our own country in many states where a like necessity exists like action should be taken to remove what is a serious menace to the authority and usefulness of the courts.

The enormous expense to which litigants are in some of our states subjected amounts in many cases to a denial of justice. The fees of stenographers and court officials are often excessive and not infrequently are greater than the compensation of counsel. Law ought to be cheap and not dear, and the poor should not feel that law is the patrimony of the rich. It is the duty of the bar of America to take heed that in our country the historian of the future shall not write of us what Gibbon wrote of the Roman Empire prior to the reforms of Justinian. "The expense of the pursuit," said he, "sometimes exceeded the value of the prize and the fairest rights were abandoned by the poverty or prudence of the claimants. Such costly justice might tend to abate the spirit of litigation, but the unequal pressure seems only to increase the influence of the rich and to aggravate the misery of the poor. By these dilatory and expensive proceedings the wealthy pleader obtains a more certain advantage than he could hope from the accidental corruption of a judge."

You come to the bar, gentlemen, at a critical period in the country's history. Never before since the government was established has agitation against existing institutions been so reckless and revolutionary and so general as now. The duty of the lawyer to the state assumes new importance in the face of the conditions which now confront this nation. Let me, therefore, commend to your thoughtful attention the weighty words of a great constitutional lawyer. In his address as president of the American Bar Association in 1894 the late Chief Justice Cooley said: "What I desire to impress at this time upon the members of the legal profession is that every one of them is or should be, from his very position and from

the license which gives him special privileges in the determination of legal questions and controversies, a public leader and teacher, whose obligations to support the constitution and laws and to act with all due fidelity to the courts is not fully performed when the fundamental organization of society is assailed or threatened, or the laws defied or likely to be in the community in which he lives, as a result of revolutionary purpose, or of ignorance, or unreasoning passion, unless he comes to the front as a supporter of settled institutions and of public order, and does what he properly and lawfully can to correct any sentiment, general or local, that would in itself be a public danger, or be likely to lead to disorder or unlawful violence."

To this eminent jurist it seemed a low and very unworthy view of the lawyer's office to assume that his duty was simply to prosecute or defend in the courts for a compensation to be paid, and that he owed no duty to society to expose false theories and counteract public ignorance and inculcate respect for law and courts and government and the rights of property.

*Henry Wade Rogers, LL.D.,
Dean of the Yale Law School.*